



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of the Navy--Reconsideration

File: B-244918.3

Date: July 6, 1992

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DIGEST

Prior decision sustaining protest of small business offeror against rejection of its proposal on grounds that the rejection of proposal for unacceptability under a responsibility-related factor was tantamount to a finding of nonresponsibility and thus required referral to the Small Business Administration is reversed where agency shows on reconsideration that proposal was unacceptable under factors not related to responsibility as well as a responsibility-related one.

DECISION

The Department of the Navy requests reconsideration of our decision, Detyens Shipyards, Inc., 71 Comp. Gen. 101 (1991), 91-2 CPD ¶ 500, in which we sustained Detyens's protest against the rejection of its proposal under request for proposals (RFP) No. N62789-91-R-0004, for the overhaul and repair of ARDM-4 SHIPPINGPORT, a repair drydock used primarily for the overhaul of nuclear attack submarines. We sustained the protest based on our understanding that the Navy had rejected Detyens's proposal based solely on its determination that Detyens, a small business, lacked the facilities required for contract performance. We held that the determination that the protester lacked adequate facilities was in essence a determination of nonresponsibility, and therefore exclusion of its proposal from the competitive range without referral to the Small Business Administration (SBA) was inappropriate.

The Navy now informs us that considerably more was involved here than a simple determination that Detyens did not have adequate facilities. According to the Navy, when the drydock Detyens had originally proposed for contract performance became unavailable, Detyens's proposal was affected under several different RFP evaluation factors, such that what had been an acceptable proposal became an unacceptable one. As discussed more fully below, we find that under such circumstances rejection of the proposal was proper and referral to the SBA was not required. We therefore reverse our prior decision.

The RFP at issue set forth eight factors to be considered in the evaluation of technical proposals and advised offerors that a proposal found to be unacceptable in any one of the eight categories could be determined to be technically unacceptable overall. The eight factors included scheduling systems, which was to include a discussion identifying key events and milestones in the project and integrating these items with critical path work items and controlling work items; technical approach to hull, mechanical, and electrical work; facilities; and manpower, which was to include projections of the number of both prime and subcontractor workdays that would be required to accomplish each work item.

Detyens originally proposed to subcontract with Jacksonville Shipyards both for the use of Jacksonville's drydock and for the actual drydocking work itself. Thus, Detyens's proposal discussed Jacksonville's technical approach to drydocking the ARDM-4 and accomplishing the drydocking overhaul work and indicated that Jacksonville would provide approximately 2,057 workdays of labor.

On July 15, after best and final offers (BAFO) had been received and while the agency was awaiting a determination by the SBA regarding the responsibility of the lowest-priced, technically acceptable offeror, Robert E. Derecktor of Rhode Island, Inc., an employee of Detyens, which was second in line for award, telephoned the contracting officer's representative with information regarding the sale of Jacksonville's drydock. According to the contracting officer's representative, the Detyens employee informed her that the drydock specified in Detyens's proposal had been sold and was no longer available for use during the ARDM-4 overhaul. Further, according to the Navy employee, he asked whether or not the Navy would allow him to substitute another drydock and stated that he would like to know this

before he went through the trouble of trying to locate one.' On July 18, the contracting officer's representative notified the chairman of the technical evaluation team that the drydock that Detyens had proposed to use had been sold and was no longer available for use during the overhaul period and that Detyens did not currently have arrangements for the use of any other drydock.

The agency states that the chairman of the technical evaluation panel considered the impact of this information on each of the evaluation factors in reevaluating Detyens's technical proposal. According to the agency, loss of Jacksonville as a subcontractor rendered the Detyens proposal unacceptable under the evaluation factors governing scheduling, manpower, and technical approach to hull, mechanical, and electrical work, as well as under the facilities factor. Thus, the agency states its rejection of Detyens's proposal was based not solely on a determination that Detyens lacked adequate facilities, but rather on a determination that the proposal was unacceptable under a

'As noted in our original decision, Detyens disputes the agency's version of this telephone conversation. According to the Detyens employee, he did not state that the drydock had been sold and would be unavailable; rather, he insists, he informed the contracting officer's representative only that it had come to Detyens's attention that its drydocking subcontractor might be selling its drydock and asked what the procedure would be for substituting another drydock in the event this became necessary.

Based on the hearing testimony, we conclude that what the Detyens employee probably said was something to the effect that he had heard that the Jacksonville drydock was being sold, in which case it might be unavailable for the overhaul, and that he therefore desired information concerning the possibility of substituting another drydock subcontractor. Although the Detyens employee may have intended to convey through such a communication only that rumors were circulating concerning a sale of the drydock and to find out what alternatives might be available to Detyens in the event the sale were finalized, we think that it was reasonable for the contracting officer's representative to have understood the message to be that the drydock had in fact been sold. Regardless of what was said during the conversation on July 15, Detyens concedes that Jacksonville informed it at some point between July 25 and July 30, i.e., prior to the date of award, that its drydock would be unavailable for the overhaul and that Jacksonville did not intend to honor its bid. In other words, it is not disputed that at the time of award Detyens could not have performed in accordance with its proposal.

variety of factors, some of which, i.e., technical approach to hull, mechanical, and electrical work, were not responsibility-related.

The subcontracting arrangement with Jacksonville proposed by Detyens clearly had a direct relation to the evaluation factors cited by the agency; we therefore see no basis to object to the agency's conclusion that the loss of Jacksonville's participation rendered Detyens's proposal unacceptable under those factors. Where, as here, an agency rejects a proposal as technically unacceptable on the basis of factors not related to responsibility as well as responsibility-related ones, referral to the SBA is not required. See TM Sys., Inc., B-236708, Dec. 21, 1989, 89-2 CPD ¶ 577. Accordingly, we reverse our prior holding that the decision to exclude Detyens without a referral to the SBA was improper.

We are left then with Detyens's argument that it was inappropriate for the agency to consider information orally communicated by Detyens after receipt of BAFOs in a reevaluation of its proposal. In its protest, Detyens argued that the telephone call of July 15 should not have been viewed as a modification to its proposal since the communication did not comply with the requirements of Federal Acquisition Regulation (FAR) § 52.215-10, governing the late submission, modification, or withdrawal of proposals.

The contracting officer correctly considered the information concerning the sale of the Jacksonville drydock in considering Detyens's proposal. In appropriate circumstances, contracting officers should consider extrinsic evidence when evaluating proposals. See Magnavox Advanced Prods. and Sys. Co., 69 Comp. Gen. 89 (1989), 89-2 CPD ¶ 458; New Hampshire-Vermont Health Servs., 57 Comp. Gen. 347 (1978), 78-1 CPD ¶ 202. This is clearly such a case. To require an agency to ignore extrinsic evidence indicating that an offeror cannot perform in the way it offered to perform would be unfair to both the agency and to other competitors and thus inconsistent with the competitive procurement system. See, e.g., Omni Analysis, 68 Comp. Gen. 300 (1989), 89-1 CPD ¶ 239; Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53.

The prior decision, including the finding that Detyens is entitled to the costs of preparing its proposal and of pursuing its protest, is reversed.

Milton J. Jordan
for Comptroller General
of the United States